No. 03-526

Supreme Court, U.S.
FILED
JAN 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DORA B. SCHRIRO, Director, Arizona Department of Corrections,

Petitioner,

vs.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE ARIZONA VOICE FOR VICTIMS, INC., NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE, AND NATIONAL ORGANIZATION OF PARENTS OF MURDERED CHILDREN, INC. IN SUPPORT OF PETITIONER

STEVE TWIST
Counsel of Record
TIMOTHY LA SOTA
ARIZONA VOICE FOR CRIME VICTIMS, INC.
216 North Central Avenue, #391
Phoenix, AZ 85004
(602) 788-1316

DOUGLAS E. BELOOF
Associate Professor of Law, Director
CRIME VICTIM LAW INSTITUTE
Lewis and Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6749

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF *AMICI CURIAE* INTEREST

Arizona Voice for Crime Victims, Inc. ("AVCV") works to ensure that Arizona's crime victims' state constitutional rights to justice and due process throughout the criminal justice process are protected. To achieve this purpose, AVCV educates and empowers victims of crime through legal advocacy, crisis response training, and continuing legal education for the judiciary, lawyers and law enforcement.[1]

The vision of AVCV is to establish a compassionate justice system in which crime victims know how to seek immediate crisis intervention when they become victims of crime, are informed of their rights under the Arizona constitution, fully understand those rights, and have a meaningful way to enforce them.

Consistent with this vision is the goal of assisting the judiciary in balancing the Sixth Amendment rights of the accused with the crime victim's right to resolution and need in the community for deterrence. Because of the potentially catastrophic effect this case may have on a victim's right to resolution, AVCV has a strong interest in the outcome of this case.

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[1] This brief is filed with the consent of counsel for both parties. Pursuant to Supreme Court Rule 37.3(a), copies of letters of consent accompany the brief. Counsel for AVCV, NVCLI, NOVA, and POMC authored this brief. No counsel for the parties authored this brief in whole or in part. No one outside the *amicus curiae* (AVCV, NVCLI, NOVA, and POMC), its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

The National Crime Victim's Law Institute ("NCVLI") is a non-profit educational organization dedicated to defending the dignity and legal rights of crime victims and promoting a fair and balanced criminal justice system through legal education, legal scholarship, legal information resources, and legal advocacy. It operates a legal clinic protecting victims through legal action and has a strong interest in defending victims' rights to finality.

The National Organization for Victim Assistance ("NOVA") is a private, nonprofit organization of victims and victim advocates, including legal professionals, who are committed to the recognition and implementation of victims' rights and services. Founded in 1975, NOVA is the oldest national group of its kind in the worldwide victims' movement. NOVA's mission is to promote rights and services for victims of crime and crisis everywhere. Its experience is described in the following review of its guiding purposes.

The National Organization of Parents of Murdered Children ("POMC") provides the ongoing emotional support needed to help parents and other survivors facilitate the reconstruction of a "new life" and to promote a healthy resolution. Not only does POMC help survivors deal with their acute grief, but with the criminal justice system as well. POMC provides training to professionals in such fields as law enforcement, mental health, social work, community services, law, criminal justice, medicine, education, religion, the media and mortuary science, who are interested in learning more about survivors of homicide victims and the aftermath of murder.

These four organizations have come together in support of victims to ensure that justice is applied across the board to both victims and defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

Arizona's Supreme Court and the Court of Appeals for the Ninth Circuit have reached different conclusions about whether the new sentencing scheme enacted as a result of *Ring v. Arizona* is to be retroactively applied to capital cases on collateral review. 536 U.S. 584 (2002). This court has granted certiorari to hear this case from the Ninth Circuit Court of Appeals specifically to answer two questions:

1) Did the Ninth Circuit err by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality)?

2) Did the Ninth Circuit err by holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock principles and seriously enhance the accuracy of the proceedings?

Looking at this scenario from the viewpoint of the many victims in this case, and from the time-honored views of Justice Harlan on the rules for retroactivity, this Court should hold that the new sentencing procedure established by *Ring* is to be applied prospectively only. Justice serves all in this nation: defendants and victims.

Arizona is especially cognizant of how new procedures and legislation affect victims because the people of Arizona have affirmatively afforded victims constitutional rights.

If *Ring* is applied retroactively to the capital cases that have exhausted their state court remedies, it would have a devastating effect on the health and well-being of the victims. Victims suffer not only the traditional issues of grief over losing a loved one, but they suffer from issues unique to those whose loved one was murdered, including general anxiety disorders, Post-Traumatic Stress Disorder, and other issues specifically related to the trauma of violence and murder. This court must consider the traumatic impact of resentencing these capital cases would have on the victims finding or keeping any sense of resolution.

The death that occurs by violence is much different for the loved ones than a death by natural causes or accident.[2] Homicide survivors experience degrees of impairment including physical effects, psychological suffering, financial problems, emotional suffering, and social problems. Unlike traditional grieving periods, homicide survivors have a more difficult experience due to many complicated factors unique to murder cases.

Applying new rules to old findings sets a scene of ever-changing jurisprudence that undermines the sense of resolution and stability the people place in the justice system. No one benefits if convictions are constantly

[2] Victims of Violence "Homicide Survivors." <http://www.victimsofviolence.on.ca/homsur.html> (Accessed December 27, 2003). Most information in this section will come from this site, unless noted otherwise.

subjected to new litigation, especially when courts disagree so often. Victims need reasonable resolution.

Applying *Ring* retroactively to these capital cases would eliminate any sense of resolution. In *Teague*, this court relied on finality to set the rules for retroactive application of new jurisprudence. Reviewing the new sentencing scheme under a *Teague* analysis reveals that *Ring* fails to meet any requirement for retroactive application. *Ring* is a procedural change to the sentencing scheme, not a substantive change. *Ring* also fails to fall within either of the two *Teague* exceptions to procedural changes. Therefore, *Ring* is not required to be applied retroactively.

This Court can and should maintain its application of justice to all involved and determine that *Ring*, and Arizona's new sentencing scheme applies prospectively only. By this, the victims can be saved from retraumatization and continue to find resolution to their life-altering grief.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE CAPITAL PUNISHMENT SENTENCES FOR MURDERERS THAT WERE TRIED, CONVICTED, AND SENTENCED UNDER THE EFFECTIVE LAW AT THE TIME OF THEIR SENTENCING BECAUSE THE COMMANDS OF JUSTICE SERVE BOTH DEFENDANTS AND VICTIMS.

Currently, eighty-eight convicted murderers, who are not entitled to relief under Arizona's state courts, are on Arizona's death row. These criminals were tried, convicted,

and sentenced under the prevailing law at the time of their trials. They have exhausted their state court remedies.

Per this Court's decision in *Ring*, Arizona's procedure for carrying out its capital law sentencing has changed. Prior to *Ring*, Arizona, like Colorado, Idaho, Montana, and Nebraska, operated under a system of judges determining and setting the final sentence.[3] Four other states use a similar combination of judge and jury final determinations. This Court decided in *Ring* that the Sixth Amendment requires a jury to make any finding of fact that lengthens a sentence, including aggravating factors for felony murder that allows imposition of a death sentence. The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Ring did not address the retroactivity of this new determination, even though the issue was put before this

[3] Bryan A. Stevenson. "Two Views on the Impact of *Ring v. Arizona* on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing." 54 Ala. L. Rev. 1091, 1095 (2003).

Court by our *amici curiae* brief submitted at that time.[4] In her dissent in *Ring*, Justice O'Connor predicted this situation occurring, but she saw a foregone conclusion that the death row inmates who had already completed their direct appeals would be barred from federal collateral review by *Teague v. Lane*, 489 U.S. 288 (1989).[5] Currently, Arizona is left with death row inmates and victims who wait in limbo wondering if the final sentencing determination is truly final.

Now Arizona is in a state of confusion about the current status of capital punishment for these convicted murderers. There should not be such confusion. The laws, as they read plainly, are simple and straightforward. A person is tried, convicted, and sentenced for murder per the law. Capital punishment is requested, and, if appropriate, is imposed. No changes have been made to the crime, the sentence, or the factors influencing the sentence. Should it matter for these eighty-eight convictions that the actual procedure for determining sentencing has changed? The substantive law for the elements of murder,

[4] Please *see Amici Curiae* brief submitted on behalf of Respondent in *Ring v. Arizona*, 536 U.S. 584 (2002) by Arizona Voice for Crime Victims, Inc. and the National Crime Victim Law Institute.

[5] *Ring*, 536 U.S. at 620-621. "The decision today is only going to add to these already serious effects. The Court effectively declares five States' capital sentencing schemes unconstitutional. There are 168 prisoners on death row in these States, each of whom is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review." (internal cites omitted).

its penalty ranges, and the requirements to be met for capital punishment remain unchanged.

The issue that this Court is addr ssing stems from conflicting rulings by the Arizona Supreme Court and the Ninth Circuit Court of Appeals. Arizona's Supreme Court has determined that *Ring* is not retroactive. *State v. Towery*, 64 P.3d 828 (Ariz. 2003) (decision consolidating four capital cases).[6] Yet, concurrently, the Ninth Circuit has determined that *Ring* applies retroactively to cases on collateral review. *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) (en banc). These are two standards that cannot coexist. This confusion is spilling over to other districts that are awaiting this Court's decision to settle their own actions regarding their pre-*Ring* capital convictions.[7] This Court must settle the conflict in the best interests of the people of Arizona, the people of this Nation, and for the surviving victims of the murders.

In deciding whether to apply the *Ring* decision retroactively, this Court should consider the full effects of the decision. Holding new sentencing trials for the convicted murderers who have reached their final appeals would have disastrous effects on the victims and the people's faith in the judicial system.

[6] *Id.*

[7] *See Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002) (finding *Ring* is a procedural rule change like *Apprendi*); *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003) (finding *Ring* changed a procedural rule); *United States v. Battle*, 2003 U.S. Dist. LEXIS 17987 (N.D. Ga. Sept. 22, 2003) (finding the sentencing procedure to be a split authority among circuits, therefore grounds for appeal).

A. Victims deserve justice, and should not be forced to suffer twice.

The new sentencing procedure in Arizona should only be applied prospectively to ensure justice for all. Retroactive application would force the surviving loved ones of homicide victims to suffer twice. The surviving loved ones are considered "victims" under Arizona law, and are fully entitled to all the rights of victims of crime under the Victim's Bill of Rights.[8] These victims have the constitutional right, under Arizona's Constitution, "[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."[9]

When enacting the Victim's Rights Implementation Act, Arizona's legislature established its intent beyond any doubt to protect the rights of victims. The legislative intent section to the Victim's Rights Implementation Act states:

> The legislature recognizes that many innocent persons suffer economic loss and personal injury or death as a result of criminal acts. It is the intent of the legislature of this state to:

[8] Arizona Constitution, Art. II, § 2.1(C) states "'Victim' means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused."

[9] Arizona Constitution, Art. II, § 2.1(A)10 states that victims are entitled "To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."

1. Enact laws that define, implement, preserve and protect the rights guaranteed to crime victims by Article II, § 2.1, Constitution of Arizona.

2. Ensure that Article II, § 2.1, Constitution of Arizona, is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals.

3. Ensure at all stages of the criminal justice process that the duties established by Article II, § 2.1, Constitution of Arizona, are fairly apportioned among all law enforcement agencies, prosecution agencies, courts and corrections agencies in this state.

4. Ensure that employees of this state and its political subdivisions who engage in the detention, investigation, prosecution and adjudication of crime use reasonable efforts to see that crime victims are accorded the rights established by Article II, § 2.1, Constitution of Arizona.[10]

Capital cases linger for many years due to the number of appeals a convicted person is allowed.[11] Surviving

[10] Arizona Revised Statutes § 13-4401 *et seq.*

[11] According to the U.S. Department of Justice, Bureau of Justice Statistics, Bulletin: Capital Punishment 2002, page 11. < http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf> (released November 2003), in 2002, there was an average of 127 months (10 years, 7 months) lapse of time between original sentencing and carrying out of the death penalty. However, **in Arizona**, the length of time between sentencing and execution after the appeal process is completed ranges from **9.9 years to 24 years**, with a median of 17.4 years. Janet Napolitano, Attorney General of Arizona. "Capital Case Commission Final Report: Attachment B." <http://www.attorneygeneral.state.az.us/CCC/FinalReport.html> (December 31, 2002).

victims have already waited many years for the murderers to exhaust their appeals. Now, when they have reached the point of seeing the end of the process at hand, the Ninth Circuit's *Ring* decision raises the specter that the promise of resolution will vanish, leaving victims to suffer through the long process of resentencing and appeals again. And in the process, the Ninth Circuit's *Ring* ruling would give murderers more opportunities to escape the sentence that was fairly handed down under the laws in place at the time. It would take years to resentence these murderers. The victims in these cases, estimated at seven to ten close relatives per murder, not including friends, coworkers, and neighbors,[12] thought they had found resolution, something that is critical to recovery from any form of grief or loss. Allowing the Ninth Circuit's *Ring* ruling to stand would deprive the victims of the resolution and finality that they so desperately need.

The Judiciary Committee's report to the United States Senate on the proposed Crime Victims' Rights Amendment (which was reported favorably to the Senate November 11, 2003), reported that:

> Victims, too, as well as society as a whole, have an interest in the prompt resolution of criminal cases. "Repeated continuances cause serious hardships and trauma for victims as they review and relive their victimization in preparation for trial, only to find the case has been postponed."

[12] National Center for Victims of Crime. Victim Assistance: Get Help Series: "Homicide Survivors: Introduction." <http://www.ncvc.org/gethelp/homicidesurvivors/> (Accessed December 17, 2003). (citing grief expert Lu Redmond).

> For victims, "[t]he healing process cannot truly begin until the case can be put behind them. This is especially so for children and victims of sexual assault or any other case involving violence."[13]

The report went on to state that sometimes the interests of victims, society, and the government are not necessarily the same as the interests of defendants or that these interests are reflected in the Sixth Amendment. Collene Campbell, a homicide survivor testified to the Committee:

> I'm certain this is not what the Founders of this great nation and the authors of our Constitution intended and it needs to be corrected immediately. At a huge cost to taxpayers, and my families [sic] personal life, we have continued to be in the court system for 21 straight years, with no right for a speedy trial and there is no end in sight.[14]

Many victims cannot begin the healing process until the case is behind them. Even worse for victims would be the scenario ordained by the Ninth Circuit's holding in this case, where victims would have to go through the criminal process again after they thought it was behind them.

If a new sentencing trial is held, these victims must reopen old wounds. Some of the victims are likely witnesses, and would have to testify again. Media coverage

[13] Sen. Jud. Comm. Rep. 108-191, at p. 27 (November 7, 2003) (Report on the Crime Victims' Rights Amendment, Joint Resolution (S.J. Res. 1), language adopted by the majority, to be adopted without amendment) (quoting the President's Task Force on Victims of Crime, Final Report 75 (1982)).

[14] *Id.* at 28. ("families" in original).

would resume. Resolution and recovery would be lost; all the more precious for the short time they may have found it; all the harder to find a second time.

1. Victims suffer anxiety disorders

Homicide victims can experience various degrees of anxiety disorders in reaction to the traumatic event of the murder. Experiencing a violent crime, or the loss of a loved one to a violent crime, can cause Acute Stress Disorder within the first two to four weeks of the occurrence.[15] Victims with this anxiety disorder may experience flashbacks, dissociation (feeling detached from one's emotions or body), hyperarousal, generalized anxiety, and avoidance of reminders of the event. However, if these behaviors persist beyond one month and become associated with functional impairment, then the victim is experiencing post-traumatic stress disorder ("PTSD"). PTSD is divided into three categories: 1) acute (less than three months), 2) chronic (greater than three months), and 3) delayed onset (starts after six months from the traumatic event). About half of PTSD cases subside within six months, but others can last the remainder of the person's life.

It is estimated that at least 13 million people in America have PTSD at any one time.[16] Of these, 14.3% are at risk to develop PTSD following the unexpected death of

[15] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, page 467 (4th ed., 1994), Washington, D.C.

[16] PTSD Alliance. "About PTSD: Statistics" <http://www.ptsdalliance.org/about_what.html> (Accessed December 29, 2003).

a family member or friend, and another 7.3% as a witness to killing or serious injury.[17]

PTSD involves very serious changes in a person's life. People with PTSD suffer many problems. They may re-experience the event (flashbacks, nightmares, panic attacks), have uncontrollable anger, be unable to sleep, avoid reminders of the event (meaning avoiding anything that reminds them of the lost loved one), have problems breathing and heart palpitations, feel as if they are in constant danger, withdraw from friends and loved ones, be easily startled, shut down emotionally, suffer memory lapses, be unable to concentrate, stop feeling pain or other sensations, and lose interest in previously enjoyed activities. There can also be secondary and associated effects which complicate recovery.

2. Victims have atypical grief

The death that occurs by violence is much different for the loved ones than a death by natural causes or accident.[18] Homicide survivors experience degrees of impairment including physical effects, psychological suffering, financial problems, emotional suffering, and social problems. Unlike traditional grieving periods, homicide survivors have a more difficult experience due to many factors including:

[17] *Id.*

[18] Victims of Violence "Homicide Survivors." <http://www.victimsofviolence.on.ca/homsur.html> (Accessed December 27, 2003). Most information in this section will come from this site, unless noted otherwise.

- media coverage,
- lack of privacy,
- inability to grieve in private,
- having to identify the victim's body,
- pain in the knowledge that the victim suffered,
- dealing with gruesome circumstances of the crime,
- in some cases, survivors may be witnesses to the murder,
- blame,
- finding the murderer,
- if they knew the killer,
- feeling they could have prevented the death,
- thinking "what if . . . ,"
- loss of security, safety and trust,
- fear of the murderer or fear the murderer may hurt someone else,
- nightmares and images of the loved one being murdered,
- increased sensitivity toward news or images of violence,
- fear the murderer may never be found or punished, and
- wondering why the victim was killed.[19]

[19] *Id.*

Additionally, hearing witnesses and attorneys discuss the murdered person as a piece of evidence depersonalizes the event, and does not contribute to the healthy grief of a loved one. Homicide survivors must deal with traditional issues of grief, anxiety complications, and atypical grief complications while trying to find resolution.

3. There are other losses for victims

Homicide survivors go through many changes in addition to their personal reaction to grief and shock.[20] Often their lifestyles must change, as well as their interaction with the world they live in. Frequently, the survivors feel a sense of loss of self along with a sense of losing control over their lives. They may lose their independence or feel as if they must now depend more on others, including institutions they may rely on to address the crime. Loneliness and isolation increase, leading to a loss of social support and social standing in some cases. Their sense of safety and security may diminish, as well as their loss of religion or faith. For people of certain religions, questioning the "why" behind the action, understanding the rationale may be hard to internalize. In certain cases, the physical change to their living environment or community requires adaptation. Just as the terrorist attacks of September 11, 2001 mandated changes to traffic, travel routes, maps, businesses, and much more, these victims

[20] National Center for Victims of Crime. Victim Assistance: Get Help Series "Homicide Survivors: Other Losses." < http://www.ncvc.org/gethelp/homicidesurvivors/> (Accessed December 17, 2003). The information for other losses all come from this site.

must reroute their entire lives around the physical loss of a loved one.

The homicide survivors as the victims in these eighty-eight cases were "lucky" enough to reach partial completion and find some sense of resolution. The faith they found in the legal system with the successful conviction, and successful sentencing, may be lost if another sentencing trial must be held. If this court determines that *Ring* applies retroactively, these victims must suffer again. Whatever level of healing they may have reached, whatever justice they found, will be lost.

B. No one benefits, including the convicted murderer, if a criminal is sentenced today, but is subject to fresh litigation tomorrow.

Finality is a core value of Arizona's criminal justice system. Since statehood, Arizona's Constitution promises its citizens that "Justice in all cases shall be administered openly, and without unnecessary delay."[21] The people of Arizona amended the state constitution in 1990 to reaffirm explicitly this promise of finality for crime victims.[22]

In the interests of preserving the due process, fairness and finality rights that Arizona has promised to its crime victims, this Court should determine that the *Ring* capital

[21] Arizona Constitution, Art. II, § 11.

[22] At the November 6, 1990 General Election the voters of Arizona passed Proposition 104 which added the Victim's Bill of Rights, Article II, § 2.1. The Victim's Bill of Rights became effective November 26, 1990 when the election results were proclaimed by the governor.

sentencing procedure is to be applied prospectively only, as is consistent with *Teague v. Lane,* 489 U.S. 288 (1989) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).[23]

In Arizona's Supreme Court decision in *Towery*, the court declared "Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a 'prompt and final conclusion of the case after the conviction and sentence.'" 204 Ariz. at 391 (quoting Ariz. Const. Art. II, § 2.1(A)(10)).

Arizona's Supreme Court's holding in *Towery* continues to follow and uphold the important principles of finality that have underscored this Court's criminal justice jurisprudence. Justice Harlan's opinion on the significance of adherence to finality has become the foundation for this Court's jurisprudence on retroactivity.[24] The importance of finality and the role of non-retroactivity was quite succinctly put when this Court stated in *Teague*: "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal

[23] *See United States v. Moss*, 252 F.3d 993 (8th Cir. 2001) (*Apprendi v. New Jersey* not a watershed rule that seriously diminishes fairness of trial); *Dukes v. United States*, 255 F.3d 912 (8th Cir. 2001) (following *Moss*); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (under *Teague*, *Apprendi* is not retroactive to issue involving the discrepancy between information and jury instructions).

[24] *See Teague v. Lane*, 489 U.S. 288, 303 (1989) (discussing *Mackey v. United States*, 401 U.S. 667, 675 (1971) (opinion concurring in judgments in part and dissenting in part).

justice system. Without finality, the criminal law is deprived of much of its deterrent effect." 489 U.S. at 309.

Furthermore, the rationale behind finality is that "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation" *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

C. The State has a strong interest in *Ring* being prospective only

"Only with the assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing that the moral judgment will be carried out. Unsettling these expectations inflicts a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the State and crime victims alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citing *Herrera v. Collins*, 506 U.S. 390, 421 (1993)).

In *Towery*, when holding that *Ring* did not apply retroactively, Arizona's Supreme Court concluded its holding by stating:

> Finally, applying *Ring II* retroactively would greatly disrupt the administration of justice. As recognized previously, courts must protect a victim's rights by ensuring "prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. Art. II, § 2.1(A)(10). Arizona has approximately ninety prisoners on death row whose cases have become final and

> who received a sentence based upon the aggravating circumstances found by the trial judge and affirmed on appeal. Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice. As in *DeStefano [v. Woods]*, "the values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons" sentenced to death "by procedures not consistent with the Sixth Amendment right to jury trial." 392 U.S. [631] at 634, 88 S. Ct. [2093] at 2095. Moreover, vacating those prisoners' sentences without substantial justification would violate this court's duty under the Victims' Bill of Rights.

204 Ariz. 386, 393, 394. (information in brackets added).

The State must balance the rights of the defendants against the rights of the victims. This task is easier when guilt of the defendant is not in question. No one has questioned that the sentences were imposed fairly or impartially, just that judge-only sentencing was inconsistent with the Sixth Amendment. *See Towery*, 204 Ariz. at 391. Thus, the State's requirement of a fair and impartial trial was met. A fair and impartial sentencing determination was made under the law available at the time – which had been expressly endorsed by the United States Supreme Court in several cases. [25]

[25] *Towery*, 204 Ariz. at 393 (citing *Walton v. Arizona*, 497 U.S. 639, 647-649 (1990) and *Apprendi v. New Jersey*, 530 U.S. 466, 496-497 (2000)).

II. THIS COURT SHOULD MAINTAIN ITS JURISPRUDENCE ESTABLISHED IN *TEAGUE* BY HOLDING THAT *RING* CANNOT JUSTIFIABLY APPLY RETROACTIVELY TO FINAL CONVICTIONS.

If this Court were to apply an abolition of Arizona's capital sentencing structure retroactively, it would have a devastating effect on hundreds of innocent Arizona families – the loved ones of murder victims who must suffer through years of resentencing procedures waiting for justice to be done. In *Morris v. Slappy,* this Court urged that "in the administration of criminal justice, the courts may not ignore the interests of victims." 461 U.S. 1, 14 (1983).

The Court should consider the interests of crime victims if it holds for the Respondent. Retroactive application of the holding sought by the Respondent would require the reversal of death penalty final judgments and force hundreds of innocent victims to endure the uncertainty, pain, and hardship of future sentencing proceedings. The cost of applying such a holding retroactively would fall most heavily on victims by betraying the promise of resolution and creating decades of unnecessary litigation. In addition, the financial costs of prosecuting and sentencing capital cases are extremely high.[26] If these

[26] Linda M. Williams, PhD. "Case Study on State and County Costs Associated with Capital Adjudication in Arizona: Data Set III Research Report to Arizona Capital Case Commission." Submitted by the Williams Institute. <http://www.ag.state.az.us/CCC/Attachment%20D%20-%20Data%20Set%20III.pdf> (July 2001). According to this report, the time for the guilt phase of a trial ranges from four to nine days. The sentencing phase has a median time of 200 days. The total costs of both

(Continued on following page)

sentencing trials are held again, this Court must consider the burden to the people of a new trial, taking into account that there will now be jury costs for new sentencing trials. Furthermore, the sheer difficulty of a stale case – on both sides – must also be considered. This is not the application of justice, it is politics. The State will be forced to pursue the capital sentences that it can fundamentally afford to pursue. This will inevitably deny justice to those victims who are left behind.

Customarily, a newly created or newly adopted rule of constitutional law cannot be applied retroactively to a judgment and sentence that is final unless the rule fits into one of two exceptions under *Teague,* 489 U.S. at 306. First, a prisoner whose conviction is final can invoke a new rule if the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1963)). This generally applies to new rules making certain conduct exempt from the legislature's power to define criminal acts and is not implicated by *Apprendi. Id. Apprendi* held factual determinations that extend sentences must be made by juries, and is a procedural, not a substantive, change. 530 U.S. at 475. *Ring* simply extended *Apprendi*

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phases, ranging in the hundreds of thousands includes attorneys for prosecutors and defense, special investigators, jury costs, experts, and extra costs.

to the capital case context, and must therefore be a procedural rule change.[27]

The second exception requires the new rule to apply retroactively if it is a fundamental rule that ensures accuracy in the outcome of the trial. *Teague,* 498 U.S. at 313. This exception has been construed narrowly to facilitate the finality of criminal convictions, essential to the effective operation of the criminal justice system and its deterrent effect. *Id.* Since *Teague,* this Court has declined to apply retroactive relief to all habeas corpus cases involving legal claims except one, although this Court has reversed decisions based on factual claims.[28]

Even if the error in this case is found to be a structural error it does not mean that it falls within the second prong of *Teague.* This court said in *Tyler v. Cain* that "[t]he second *Teague* exception is available only if the new rule *alters our understanding* of the bedrock procedural elements essential to the fairness of a proceeding. Classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements. Nor can it be said that all new rules relating to due process (or even the fundamental requirements of due process alter such understanding)." 533 U.S. 656 (2001).

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[27] *Towery*, 204 Ariz. at 391. (citing *Cannon*, 297 F.3d at 994) ("explaining that the Tenth Circuit's conclusion that *Apprendi* announced a rule of criminal procedure forecloses the argument that *Ring* announce a substantive rule").

[28] *United States v. Mandanici,* 205 F.3d 519, 529 (2d Cir. 2000) (identifying "at least eleven new rules" of criminal procedure announced since *Teague* that this Court has declined to apply the second *Teague* exception and are therefore not retroactive).

Ring clearly should not be applied retroactively under the second *Teague* exception. The conviction remains the same. The aggravation evidence remains the same. In some of the capital cases at issue here, some of the evidence may be much more difficult to present given the lapse in time. Only the sentencer would change if this Court finds for the Respondent and applies Arizona's new capital sentencing structure retroactively. Such a modification does not invoke the narrowly interpreted exception.

That finality has become a bedrock principle of this Court's criminal justice jurisprudence and is unequivocally established in *Teague*. This Court wrote that the

> "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principal of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."[29] This Court should not now abandon these bedrock principles but instead take this opportunity to reaffirm them even as the Congress has reaffirmed them on behalf of the American people in the Antiterrorism and Effective Death Penalty Act of 1996.[30] Finally, in deciding whether to apply a rule retroactively, this Court should also look to the core values established in Arizona's criminal justice system.

[29] Tung Yin, "A Better Mousetrap: Procedural Default as a Retroactivity Alternative to *Teague v. Lane* and the Antiterrorism and Effective Death Penalty Act." 25 Am. J. Crim. L. 203, 239 (1998) (quoting *Teague*, 489 U.S. 288, 309 (1989)).

[30] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

> If applying the case retroactively would undermine a core value of that system, it should only do so when there is an express constitutional command. "The Constitution neither prohibits nor requires retrospective effect."[31]

CONCLUSION

Finality is a core value of the Arizona criminal justice system, one that is expressly guaranteed to victims in Arizona's Constitution. This Court should preserve this value unless to do so would contravene a fundamental and express constitutional command. Nothing in the Constitution or in this Court's retroactivity jurisprudence requires such a result. Everything in the eyes of justice demands fair application to all involved, and that includes the victims who would be forced to suffer again – but this time at that hands of justice. This Court should determine that *Ring* applies prospectively only, and not to cases that have already become final, and thus, reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

STEVE TWIST
Counsel of Record
ARIZONA VOICE FOR VICTIMS

[31] *Linkletter v. Walker*, 381 U.S. 618, 619-620 (1965).